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No. _____

In The
Supreme Court of the United States
October Term, 1992

United States of America, ex rel.,
The Precision Company,

Petitioner,

v.

Koch Industries, Inc., et. al.,

Respondents.

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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November 25, 1992

QUESTIONS PRESENTED

1. Whether the Tenth Circuit erred in holding that a qui tam action "based upon" an extensive independent investigation of fraudulent activities is barred by Section 3730(e)(4)(A) of the False Claims Act because the action is in any way "supported by" allegations that have been publicly disclosed.

2. Whether the Tenth Circuit erred in holding that a closely held corporation does not qualify as an "original source" under Section 3730(e)(4)(B) of the False Claims Act even though both of its shareholders have "direct and independent knowledge" of the fraudulent activities that form the basis for the qui tam action.

LIST OF PARTIES

Petitioner:

The Precision Company*

Respondents:

Koch Industries, Inc.

Koch Exploration Co.

Koch Pipeline, Inc.

Koch Services, Inc.

Koch Gathering Systems, Inc.

Minnesota Pipe Line Co.

Quanah Pipeline Corp.

Quivera Gas Co.

Koch Oil Co. of Texas, Inc.

Gulf Central Storage & Terminal Co. of Nebraska

Southwest Pipeline Co.

Chaparral Pipeline (NGL) Co.

Gulf Central Pipeline Co.

Kogas, Inc.

*The Precision Company has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 29.1.

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PETITION FOR A WRIT OF CERTIORARI

The United States of America, ex rel. The Precision Company hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

Opinions Below

The opinion of the court of appeals is reported at 971 F.2d 548 (10th Cir. 1992). A copy of that opinion, and the court's order denying petitioner's Petition for Rehearing and Motion to Add Parties, are attached to this Petition as Appendix A and Appendix B, respectively. The findings and recommendations of the magistrate judge denying

respondents' Motion to Dismiss, and the memorandum decision of the district court dismissing petitioner's action for lack of subject matter jurisdiction, are attached to this Petition as Appendix C and Appendix D, respectively.

Jurisdiction

The judgment of the court of appeals was entered on July 27, 1992. On August 31, 1992, the court of appeals denied petitioner's timely Petition for Rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

Statutory Provisions Involved

Section 3730(e)(4)(A) of the False Claims Act declares that "no court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information."

Section 3730(e)(4)(B) of the False Claims Act defines an "original source" as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information."

Statement of the Case

This Petition presents issues that sharply focus on the purpose, intent, and construction of the 1986 Amendments to the False Claims Act. Indeed, the fundamental question presented in this case is whether the lower federal courts are

properly interpreting the jurisdictional provisions of the 1986 Amendments to further the Amendments' congressional purpose of encouraging more private enforcement suits, thereby benefiting the United States Government (the "United States"), for whom qui tam cases are brought. The 1986 Amendments were

> aimed at correcting restrictive interpretations of the act's . . . qui tam jurisdiction and other provisions in order to make the False Claims Act a more effective weapon against Government fraud.

Senate Rep. No. 345, 99th Cong., 2d Sess. 23-24, reprinted in 1986 Code Cong. & Admin. News 5269. The decision below severely undermines this purpose and, as will be shown, the federal courts are in need of guidance from this Court concerning the proper interpretation of 31 U.S.C. § 3730 (e)(4)(A) and (B).

In its Complaint, The Precision Company ("Precision") alleges that Koch Industries, Inc.[1] and its various subsidiaries ("Koch Industries") have defrauded the United States in connection with Koch Industries' purchases of crude oil and natural gas from Federal and Indian lands. Specifically, by knowingly misstating in its favor the amount of crude oil and natural gas that it purchases from Federal

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[1]Koch Industries is a closely held, privately owned corporation with its principal place of business in Wichita, Kansas. Koch Industries' activities include the purchase of crude oil and natural gas from Indian and Federal lands owned and managed by the Bureau of Indian Affairs, Bureau of Land Management, and Minerals Management Service (which acts on behalf of the Bureau of Indian Affairs and Bureau of Land Management in collecting crude oil and natural gas royalty payments for production from Federal and Indian lands). According to Minerals Management Service documents listing Koch Industries' purchases of crude oil and natural gas, Koch Industries purchased $2.5 billion worth of crude oil and $4.9 billion worth of natural gas from Federal and Indian lands from 1983 to 1989.

and Indian lands, Koch Industries has fraudulently and unlawfully sought to decrease the royalty payments it and other entities were obliged to make to the United States for those purchases.[2]

Precision's Complaint is based upon an extensive investigation, begun in 1987, of Koch Industries' fraudulent mismeasurement practices. William I. Koch ("W. I. Koch") initially retained private investigators to conduct the investigation in connection with other litigation then (and still) pending. In January of 1988, he hired William A. Presley ("Presley") to interview oil field experts, investigators, gaugers, and other potential witnesses to verify that Koch Industries indeed had engaged in a pattern of stealing crude oil and natural gas from producers, including the United States. Aplt App, Doc 12, pp. 573-76.

In June of 1988, W. I. Koch and Presley formed Precision to ascertain whether and to what extent royalty payments due to producers and royalty owners could be recovered from purchasers. As part of Precision's formation, W. I. Koch contributed the information he possessed concerning Koch Industries' fraudulent scheme to mismeasure oil and gas. Aplt App, Doc 8, p. 238. Precision continued the investigation, and ultimately determined that the information it had obtained regarding Koch Industries,

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[2]Koch Industries has submitted, and caused others to submit, at least 20,000 false claims to the Minerals Management Service, the agency within the Department of the Interior charged with collecting royalty payments for the Indian Tribes. This obligation arises from the United States' fiduciary duty to account for royalties arising from Indian oil and gas leases, and from the trust relationship between the United States and the Indian people. See Parker v. Richard, 250 U.S. 235, 237 (1919) and Seminole Nation v. United States, 316 U.S. 286, 296 (1942). The Tenth Circuit's decision, based upon a jurisdictional statute that never has been interpreted by this Court, and rendered without any examination of the alleged fraud, may result in the loss of millions of dollars justly due and owing to the United States and the Indian people. Surely that is not what Congress intended when it enacted the False Claims Act and the 1986 Amendments to the Act.

which showed a company-wide scheme of intentional mismeasurement of oil and gas purchased from producers, could be the basis for False Claims Act litigation. Precision thereafter decided to bring a civil action against Koch Industries under the statute. Aplt App, Doc 12, pp. 573-76.

Later that summer, W. I. Koch was contacted by federal agents assigned to a United States Senate investigation ("Senate Investigation") of Koch Industries' fraudulent measuring practices. Precision fully cooperated with the Senate Investigation by making available its non-public documentary evidence of Koch Industries' mismeasurement practices, and by discussing the results of its investigation with the agents. The agents did not disclose to Precision any of the Senate Investigation's results. Precision also met with Senate investigators in October of 1988, and provided all of its information to the Senate, which it continued to do through May of 1989. Aplt App, Doc 12, pp. 577-97.

On May 9, 1989, the United States Senate Select Committee on Indian Affairs (the "Senate Committee") held a public hearing (the "Senate Hearing") on the subject of crude oil thefts from Indian lands. Several witnesses, including persons who previously had provided statements to Precision in connection with its investigation, testified that Koch Industries systematically had stolen crude oil from Indian lands. Information concerning Koch Industries' theft of natural gas was not disclosed at the Senate Hearing. Aplt App, Doc 12, pp. 581-82.

On May 25, 1989, Precision filed its Complaint, under seal, in accordance with the qui tam provisions of the False Claims Act, 31 U.S.C. § 3730(b)(2). The Complaint alleges that Koch Industries has engaged in a consistent pattern of mismeasuring and understating its purchases of crude oil and natural gas from Federal and Indian land sites, and seeks damages and civil penalties on behalf of the United States for false claims arising out of those fraudulent practices.

As required by the False Claims Act, Precision provided a copy of the Complaint and a confidential memorandum to the United States Department of Justice. Aplt App, Doc 1, pp. 1-18; Doc 12, p. 582. The memorandum included 57 exhibits providing evidentiary support for Precision's claims, 56 of which were the product of its investigation. All 56 investigative exhibits had been provided to the Senate Committee. The remaining exhibit, a transcript of the Senate Hearing, was included to demonstrate that the Complaint was not based on the Senate Investigation, but rather on Precision's investigation. Among the 57 exhibits attached to the confidential memorandum were 43 statements from former Koch Industries employees concerning the company's unlawful conduct, all of which were obtained prior to the Senate Hearing.

On June 8, 1989, Koch Industries submitted a statement to the Senate Committee in which it claimed that W. I. Koch was the "source and driving force" behind the Senate Investigation. The statement averred that "[t]he fact that the May 9th hearing was devoted almost exclusively to Koch Industries is a direct result of the efforts of William I. Koch. Having limited resources, the staff obviously embraced the allegations of William I. Koch. They used his witnesses and relied on the statements his investigators delivered to them. . . ." Aplt App, Doc 4, pp. 105-06.

In November of 1989, the Senate Committee issued its Final Report and Legislative Recommendations ("Senate Report"), in which the Committee concluded, inter alia:

> Koch Oil . . . , a subsidiary of Koch Industries and the largest purchaser of Indian oil in the country, is the most dramatic example of an oil company stealing by deliberate mismeasurement and fraudulent reporting. Although Koch is also the largest independent purchaser of crude oil in the United States and Canada and the largest in Oklahoma, the company pilfered additional oil from American Indians and others.

Senate Report at pp. 105-06, Aplt App, Doc 12, pp. 501-02 (footnotes omitted).

On January 23, 1990, after evaluating Precision's investigation and its ability to prosecute the action it had commenced, the United States declined to assume control of this litigation. The United States offered no objection to Precision's continuing the action, however, and specifically reserved the right to intervene at a later time. Aplt App, Doc 27, p. 1383.

On April 16, 1990, Koch Industries filed its Motion to Dismiss alleging that the district court lacked subject matter jurisdiction over Precision's qui tam claims. Specifically, Koch Industries argued that Precision's claims were "based upon" publicly disclosed information, and that Precision had failed to show it was an "original source" of that information. Koch Industries maintained that, absent such a showing, the action was jurisdictionally barred under 31 U.S.C. § 3730(e)(4)(A) and (B). Aplt App, Doc 2, pp. 19-21.

On September 14, 1990, the magistrate judge issued findings and recommendations concluding that because Precision's Complaint was not based upon prior public disclosures of information, it did not need to establish that it was an "original source" of the information disclosed at the Senate Hearing. See Appendix C. The magistrate judge also found that "even if it [Precision] did have to satisfy the [original source] rule, there exists little question that either Plaintiff's President (Presley) or its majority owner (Wm. Koch) were the original sources of . . . the Senate Hearing information (to a large degree)." Id. at 21. The magistrate judge thus concluded that Precision's qui tam action was instituted properly, that the district court had subject matter jurisdiction, and recommended that the Motion to Dismiss be denied.

On November 27, 1990, the district court rejected the magistrate judge's findings and recommendations and granted the Motion to Dismiss. See Appendix D. The district

court held that Precision's Complaint was based, at least in part, upon "publicly disclosed allegations or transactions." Id. at 26. The district court proceeded to conclude that, as a matter of law, a qui tam action based "in any degree" upon publicly disclosed allegations or transactions requires the court to proceed to an "original source" analysis under Section 3730(e)(4)(B), and that to qualify as an "original source" a plaintiff must have provided the United States with "all" of the information upon which the civil action is based. The district court also held that Precision did not qualify as an "original source" under the statute because certain information relied upon by Precision had not been turned over to the United States. Id. at 28-31.

On April 17, 1991, Precision timely filed its Notice of Appeal. Precision argued to the Tenth Circuit that its claims were not "based upon" the public disclosure of allegations or transactions concerning Koch Industries, but, rather, arose from and therefore were "based upon" the evidence it had gathered independently during its extensive investigation. Precision also contended that the district court's conclusion that an action relying "in any degree" upon publicly disclosed allegations or transactions is "based upon public disclosures" was an improper and unduly restrictive interpretation of Section 3730(e)(4)(A). Finally, Precision argued that, contrary to the district court's findings, it had provided the United States with its "information" within the meaning of Section 3730(e)(4)(B), and therefore qualified as an "original source."

On July 27, 1992, the Tenth Circuit affirmed the district court's dismissal of Precision's Complaint for lack of subject matter jurisdiction. See Appendix A. The court of appeals held that an action in any way "supported by" publicly disclosed allegations or transactions is "based upon the public disclosure of allegations or transactions" within the meaning of the False Claims Act, thereby triggering an "exacting" original source analysis under Section 3730(e)(4)(B). Id. at 6-8. Turning to that analysis, the Tenth

Circuit found that despite the exhaustive investigation conducted by W. I. Koch, Presley, and the petitioner, Precision lacked "direct and independent knowledge" of the information upon which its claims were based, and therefore did not qualify as an "original source." Id. at 10-11.

REASONS FOR GRANTING THE PETITION

I. Certiorari Should Be Granted Because The Tenth Circuit's Interpretation Of 31 U.S.C. § 3730(e)(4)(A), And Its Holding That The Precision Company's Action Is "Based Upon" The Public Disclosure Of Allegations Or Transactions, Conflict With Decisions Of Other Courts Of Appeal And Relate To An Important Unresolved Question Of Federal Law That Should Be Settled By This Court

The False Claims Act authorizes a person to bring a civil action in the name of and on behalf of the United States against a person who has submitted a "false claim" to the Government. 31 U.S.C. § 3730(b). The Act provides, however, that no court shall have jurisdiction over a qui tam action that is "based upon the public disclosure of allegations or transactions" unless the person bringing the action is an "original source." 31 U.S.C. § 3730(e)(4)(A) and (B). This absolute bar has been the subject of a large volume of litigation, and has resulted in conflicting decisions. Certiorari should be granted to resolve the conflict among the circuits concerning the proper interpretation of this important jurisdictional statute.

The First, Third, and Eleventh Circuit Courts of Appeal have interpreted Section 3730(e)(4)(A) according to its plain language and logic. They have indicated that an action is "based upon the public disclosure of allegations or transactions" only if the qui tam plaintiff actually "acquired"

or "derived" his information from public disclosures. U.S. ex rel. LeBlanc v. Raytheon Co., 913 F.2d 17, 20 (1st Cir. 1990), cert. denied, ___ U.S. ___, 111 S. Ct. 1312 (1991) (Section 3730(e)(4)(A) not a bar if information comprising claim is not "acquired" from public disclosures); U.S. ex rel. Stinson v. Prudential Ins. Co., 944 F.2d 1149, 1159-60 (3d Cir. 1991) (information "received" or "acquired" as a result of a public disclosure is "based upon" that disclosure); U.S. ex rel. Williams v. NEC Corp., 931 F.2d 1493, 1500 n.12 (11th Cir. 1991) (court must determine whether there has been a public disclosure, and if so whether the relator "based" his suit on the disclosure). Under the straightforward reasoning of these courts, an action derived from original information, or from an independent investigation by a qui tam plaintiff, would not be "based upon" any subsequent public disclosure of similar allegations or transactions.

The Tenth Circuit, on the other hand, has joined the Second Circuit to interpret the "based upon" language of Section 3730(e)(4)(A) in a restrictive way, finding that an action in any way "supported by" publicly disclosed allegations or transactions is "based upon" public disclosures within the meaning of the False Claims Act. See Appendix A, at 6-8, and United States ex rel. John Doe v. John Doe Corp., 960 F.2d 318, 324 (2d Cir. 1992) (public disclosure of allegations or transactions divests the district court of jurisdiction regardless of where the qui tam plaintiff obtained his information). This strained reading of the statute bars an action that is derived solely from original information, or from an independent investigation, simply because allegations similar to those uncovered by the qui tam plaintiff are disclosed publicly before the case is filed. This interpretation contravenes congressional intent and subverts

the plain meaning of the statute's self-evident language.[3]

The Tenth Circuit's restrictive interpretation stems, in large part, from its facile conclusion that the words "based upon" properly are understood to mean "supported by." Appendix A, at 6. The court of appeals offered no support for this proposition, other than the conclusory suggestion that it is so "as a matter of common usage." Id. As this Court has noted, however, the starting point for interpreting a statute is its language. Given a statute comprised of "plain words," Congress' intent is determined best by the language it chooses, and absent a clearly expressed legislative intention to the contrary, that language ordinarily should be conclusive. See Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 495 n.13 (1985) and Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980).

The language of Section 3730(e)(4)(A) plainly indicates that "actions" based upon "public disclosures" are barred. This language unmistakably contemplates a connection between the qui tam plaintiff's action and the relevant public disclosure. In other words, an action can be barred by the "based upon public disclosures" language only when that action (or the facts underlying the action) is derived from the disclosure itself, and not from an independent source or investigation. The decision below

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[3]This interpretation is closely akin to the classic logical fallacy rendered in Latin as "post hoc; ergo propter hoc"--the notion that, if B follows A, then B necessarily was caused by A. If Precision's suit followed the disclosure of allegations of a like kind, this argument goes, then it must be assumed to be "based upon," and based only upon, those allegations. That proposition lacks factual as well as logical underpinning, and yields anomalous results. Indeed, qui tam plaintiffs who have assembled the lion's share of the fraud evidence will be barred if any similar evidence, no matter how thin or cumulative, is revealed publicly. It even might enable the potential defendant to frustrate a qui tam action by leaking nominal information. These unintended results certainly will occur if, as the Tenth and Second Circuits have concluded, a civil action that post-dates any public disclosure whatsoever is ipso facto deemed "based upon" that disclosure.

ignores the plain meaning of the statute, however, and asks only whether the action is "supported by" similar allegations or transactions that fortuitously have been publicly disclosed. This test does not examine, as it must, whether the action is "based upon" those similar allegations. The Tenth Circuit's interpretation therefore is contrary to any sensible reading of the statute's plain language.[4]

As the record shows, Precision's action is "based upon" evidence uncovered during its own investigation of Koch Industries. In no meaningful sense is it "based upon" any "public disclosure of allegations or transactions" in a criminal, civil, or administrative hearing, including the Senate Hearing. In fact, the public disclosures at the Senate Hearing have only the slightest resemblance to Precision's comprehensive submission of detailed, sworn statements and affidavits, together with other evidence. See Aplt App, at 255-57 (listing statements and evidence), 600-48 (copies of statements), and Aplt App, at 3-200 (Senate Hearing Transcript). Precision's written statements were not disclosed at the Senate Hearing, although 2 (out of 43) of the

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[4]Cases decided under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), which contains a jurisdictional bar similar to § 3730(e)(4)(A), are illuminating. The FSIA provides, in pertinent part, that a foreign state is not immune from jurisdiction if the plaintiff's action is "based upon" a foreign state's regular course of commercial conduct with the United States. This "based upon" requirement has been construed uniformly to mean that there must be a "connection" or an "identifiable nexus" between the commercial conduct and the action. Gould, Inc. v. Mitsui Mining & Smelting Co., 947 F.2d 218, 221 (6th Cir. 1991), cert. dismissed, ___ U.S. ___, 112 S. Ct. 1657 (1992); Santos v. Compagnie Nationale Air France, 934 F.2d 890, 892 (7th Cir. 1991); Rush-Presbyterian-St. Luke's Medical Center v. Hellenic Republic, 877 F.2d 574, 582 & n. 10 (7th Cir.), cert. denied, 493 U.S. 937 (1989). See also United States v. Hastings, 296 U.S. 188, 194 (1935) (in a statute limiting jurisdiction to cases in which the district court's decision is "based upon" the invalidity of an underlying criminal statute, the words "based upon" contemplates a nexus or link between the decision and the determination of invalidity).

declarants did testify and 4 exhibits (back gauging reports provided to the Department of Justice) were received into the Senate Hearing record. See Aplt App, at 254. The record clearly demonstrates that the evidence upon which Precision's action was based was not and could not have been drawn from the Senate Hearing because that evidence was not presented in those proceedings. It is more accurate to say that the Senate relied in part on evidence submitted by Precision. Indeed, that was the gravamen of Koch Industries' acrimonious statement to the Senate Committee that the Senate "embraced the allegations of William I. Koch." This admission confirms that Precision's Complaint was not "based upon" any public disclosures from the Senate Hearing.

The Tenth Circuit's decision also resulted from a misconstruction of Section 3730(e)(4)(A) and a misguided focus on whether that provision should be applied only to actions based "solely" upon publicly disclosed information. Appendix A, at 6. The court noted that Congress had chosen not to employ the adverb "solely," and indicated that it was not inclined to read the statute expansively by interpolating that word into it. To do so, the court stated, "would dramatically alter the statute's plain meaning." Id. Precision respectfully submits that the Tenth Circuit turned this interpretation issue on its head.

The issue before the courts below was not whether it was proper to import the word "solely" into the statute, but rather whether it was proper for the court to insert the words "in any degree" or "in any part" between the words "based" and "upon." This interpretation, adopted by both the district court and the court of appeals,[5] is an impermissible reading of Congress' jurisdictional grant, and alters the statute's plain meaning by inserting limiting language that Congress might have used, but did not. Indeed, the words "based upon public disclosures" have been changed to mean "supported in any

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[5]See Statement of the Case, at pp. 7-8.

part" by publicly disclosed allegations or transactions. Under this interpretation, if 99% of the information supporting a qui tam complaint is gathered independently, and only 1% is publicly disclosed material, the complaint is "based upon" public disclosures for purposes of the statute, and is jurisdictionally barred. Such a result clearly is contrary to Congress' intent. Congress made it absolutely clear in 1986 that it intended to lower the barriers to qui tam actions. Senate Rep. No. 345, 99th Cong., 2d Sess. 23-24, reprinted in 1986 U.S. Code Cong. & Admin. News 5288-89.[6]

Precision's investigation began long before any public disclosure occurred in connection with the Senate Investigation, and continued after the Senate Committee reported that Koch Industries was stealing crude oil from Indian lands. (The Senate Report itself was not released until several months after Precision filed its Complaint under seal in the district court.) Since the commencement of Precision's investigation of Koch Industries in October 1987, scores of witnesses with knowledge of Koch Industries' thefts have been located and interviewed. Aplt App, Doc 12, pp. 577-97. Other experts were retained to observe Koch Industries' crude oil and natural gas mismeasurement

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[6]Contrary to the result below, courts have indicated that the bar of § 3730(e)(4)(A) applies only when a complaint is based solely on publicly disclosed information. See Houck on Behalf of U.S. v. Folding Carton Administration Committee, 881 F.2d 494, 504 (7th Cir. 1989), cert. denied, 494 U.S. 1026 (1990). This interpretation is supported (and required) by § 3730(d)(1) of the False Claims Act, which permits a relator who is not the original source of public disclosures to file a complaint based "primarily" on those disclosures, and if the suit is successful, to recover a percentage of the United States' award. This section plainly evidences Congress' intent to allow a relator to commence a qui tam action so long as his complaint is not based solely upon public disclosures. The Tenth Circuit's holding -- that a claim based "in any part" upon publicly disclosed information is barred -- is completely inconsistent with this section, which expressly authorizes compensation to persons commencing an action based primarily on disclosures in congressional hearings or otherwise.

practices. Id. This is the evidence that forms the basis of Precision's action. Public disclosure at the Senate Hearing of allegations of crude oil thefts does not alter the fact that Precision's action is based upon information and knowledge it uncovered in its independent investigation.

Certiorari should be granted to resolve the conflict among the circuits concerning the interpretation of the words "based upon" in Section 3730(e)(4)(A), and to insure that this important federal statute is construed by the lower federal courts to effectuate Congress' clearly expressed intent to expand, not contract, the class of eligible False Claims Act plaintiffs. The unnatural jurisdictional barrier erected by the court below must be removed to enable the statute to accomplish its purpose. Clear guidance from this Court is necessary to prevent further confusion, and to enable litigants and the courts to go about the business of uncovering and rectifying fraud upon the United States and the Indian tribes in the most effective fashion possible.

II. Certiorari Should Be Granted Because The Tenth Circuit's Interpretation Of 31 U.S.C. Section 3730(e)(4)(B), And Its Holding That The Precision Company Does Not Qualify As An "Original Source" Of The Information On Which Its Allegations Are Based, Relate To An Important Unresolved Question Of Federal Law That Should Be Settled By This Court

Even though a court finds that a qui tam action is "based upon the public disclosure of allegations or transactions," Congress has declared that the action still can be heard if the person bringing the action is an "original source." Specifically, the court must determine whether that person has "direct and independent knowledge" of the information on which his allegations are based. 31 U.S.C. § 3730(e)(4)(B). This "original source" requirement has been the subject of important, recurring, and conflicting

litigation. See U.S. ex rel. Stinson v. Prudential Insurance Co., 944 F.2d at 1160-61 (an original source is a close observer of the fraudulent activity or one whose substantive information results from an independent investigation); Houck on Behalf of U.S. v. Folding Carton Administration Committee, 881 F.2d at 504-05 (a relator who would not have obtained information absent a public disclosure does not have direct and independent knowledge, and does not qualify as an original source); U.S. ex rel. LeBlanc v. Raytheon, 913 F.2d at 20 (government employee with contractual responsibility for uncovering fraud lacks independent knowledge and is not an original source); U.S. ex rel. Dick v. Long Island Lighting Co., 912 F.2d 13, 16-17 (2d Cir. 1990) (in order to qualify as an original source a plaintiff must have directly or indirectly been a source to the entity that publicly disclosed the allegations on which the suit is based); Wang v. FMC Corp., 975 F.2d 1412 (9th Cir. 1992) (all those who directly or indirectly disclose an allegation can qualify as an original source). Certiorari should be granted to provide the lower federal courts with badly needed guidance concerning the proper construction of this important jurisdictional provision.

Having concluded that Precision's action was in part "supported by" and therefore was "based upon" public disclosures, the Tenth Circuit turned to the issue of whether Precision qualified as an "original source" under Section 3730(e)(4)(B). The court reviewed the "classes of information" upon which Precision's claims were based, which it described as follows: (i) information gathered by W. I. Koch; (ii) information gathered by Presley from January of 1988 to June of 1988; and (iii) information gathered by Presley after becoming President of Precision in

June of 1988.[7] Appendix A, at 10-11. The court of appeals then reasoned that because Precision had "made no showing" that it had a "legitimate claim" to the information gathered by W. I. Koch and Presley, it lacked the "direct and independent knowledge" required by Section 3730(e)(4)(B). Id., at 11. *The Tenth Circuit therefore held that the "direct and independent knowledge" of W. I. Koch and Presley, the sole shareholders of Precision, does not constitute "direct and independent knowledge" held by Precision within the meaning of Section 3730(e)(4)(B).*

The Tenth Circuit's interpretation is contrary to the express provisions of the Act, which provide that "[a] person may bring a civil action for violation of [the Act] for the person and for the United States Government," and that no court shall have jurisdiction over a qui tam action based upon the public disclosure of allegations or transactions "unless the action is brought by the Attorney General or the person bringing the action is an original source of the information." 31 U.S.C. § 3730(b) and (e)(4)(A) (emphasis supplied). It is well-settled that a corporation is a person for False Claims Act purposes. See 1 U.S.C. §1 ("In determining the meaning of any Act of Congress . . . the words 'person' and 'whoever' include corporations, companies, associations . . . as well as individuals."). Thus, the statute expressly authorizes a corporation, such as Precision, to be a relator in a qui tam action.

Moreover, the legislative history of the False Claims Act suggests Congress contemplated that a variety of "original sources" would bring qui tam actions. The 1986 Amendments were passed in part (1) to correct a federal

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[7]It is undisputed that Precision's claims are based upon information gathered by W. I. Koch, Presley on behalf of W. I. Koch, and Precision. Aplt App, Doc 4, pp. 101-04; Aplt App, Doc 8, pp. 237-57; Aplt App, Doc 12, pp. 573-76. It also is undisputed that this information was gathered during the extensive investigation of Koch Industries' fraudulent scheme, and that the investigation led to the formation of Precision in June 1988. Id.

court's refusal to allow the State of Wisconsin to bring a qui tam action even though it was the source of the facts supporting the complaint, and (2) more generally to encourage the commencement of False Claims Act suits on behalf of the United States and to expand the role of qui tam plaintiffs. See U.S. ex rel. State of Wisconsin (Dept. of Health & Social Services) v. Dean, 729 F.2d 1100 (7th Cir. 1984) and Senate Rep. No. 345, 99th Cong., 2d Sess. 23-24, reprinted in 1986 U. S. Code Cong. & Admin. News, at 5269 and 5288-89. The Tenth Circuit's restrictive interpretation of the "original source" requirement impermissibly undermines these stated goals, and ignores the False Claims Act cases in which the qui tam relator was not a natural person. See U.S. ex rel. Woodard v. Country View Care Center, Inc., 797 F.2d 888 (10th Cir. 1986) (State of Colorado found to be a proper relator) and U.S. ex rel. Stinson v. Provident Life & Acc. Ins. Co., 721 F. Supp. 1247, 1258 (S.D. Fla. 1989) (law firm partnership found to be an original source).

Straining for a rationale to support the district court's dismissal (and employing a different rationale than did the lower court),[8] the Tenth Circuit ignored the uncontroverted evidence in the record, which conclusively establishes that Precision is entitled to use the information developed by W. I. Koch and Presley. In his Affidavit of June 6, 1990, Presley testified that W. I. Koch contributed that information

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[8]In reaching its decision, the court of appeals effectively reversed the district court, which had found expressly that Precision had "direct and independent knowledge" of the information upon which its claims are based, as required by § 3730(e)(4)(B). See Appendix D, at 29. Faced with this surprise ruling, Precision filed a Motion to Add Parties with the court of appeals, seeking to add W. I. Koch and Presley as parties plaintiff. Precision argued that the addition of Messrs. Koch and Presley would not prejudice Koch Industries, was authorized by this Court under Mullaney v. Anderson, 342 U.S. 415 (1952), and was in the best interest of the United States. The Tenth Circuit denied that request without explanation. See Appendix B. That ruling conflicts with this Court's decision in Mullaney, was erroneous, and should be corrected by this Court.

to Precision:

> As part of the formation of Precision, and in consideration for his initial 50% stock ownership in Precision, among other things, William I. Koch agreed to contribute all information he possessed concerning Koch's fraudulent scheme to mismeasure crude oil and natural gas. We also agreed to share with each other the results of our future investigative efforts.

Aplt App, Doc 8, p. 238. Precision thus has as much a "claim" to this information as any corporation ever can have.

If the court of appeals' opinion is left standing, many legitimate attempts to punish those who have defrauded the United States will be frustrated because corporate qui tam plaintiffs cannot meet the Tenth Circuit's hypertechnical "direct and independent knowledge" test. Indeed, since no juridical entity ever possesses knowledge apart from the knowledge of the natural persons who act as its agents, officers, directors, and shareholders, courts will be compelled to conclude that no corporation ever can be a qui tam relator. Certiorari should be granted to correct this misconstruction of the False Claims Act, and to insure that the important congressional mandate to expand the class of eligible qui tam plaintiffs is effectuated in this and other cases.

CONCLUSION

For the reasons set out above, Precision respectfully requests that this Court grant certiorari on the issues requested.

Respectfully submitted,

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November 25, 1992

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, ex rel.
THE PRECISION COMPANY,

Plaintiff - Appellant,

v.

KOCH INDUSTRIES, INC.;
KOCH EXPLORATION CO.; KOCH PIPELINE, INC.;
KOCH SERVICES, INC.;
KOCH GATHERING SYSTEMS, INC.;
MINNESOTA PIPE LINE CO.;
QUANAH PIPELINE CORP.; QUIVIRA GAS CO.;
KOCH OIL CO. OF TEXAS, INC.;
GULF CENTRAL STORAGE & TERMINAL CO. OF NEBRASKA;
SOUTHWEST PIPELINE CO.;
CHAPARRAL PIPELINE (NGL) CO.;
GULF CENTRAL PIPELINE CO.;
KOGAS, INC.,

Defendants - Appellees.

No. 91-5062
July 27, 1992

J. David Jorgenson (G. W. Turner III and P. Scott Hathaway with him on the brief) of Conner & Winters, Tulsa,

Oklahoma, for Plaintiff-Appellant.

Robert L. Howard of Foulston & Siefkin, Wichita, Kansas (James M. Armstrong of Foulston & Siefkin, Wichita, Kansas; Clyde A. Muchmore of Crowe & Dunlevy, Oklahoma City, Oklahoma, with him on the brief) for Defendants-Appellees.

Before BALDOCK and BRORBY, Circuit Judges, and BELOT,* District Judge.

BRORBY, Circuit Judge.

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* The Honorable Monti L. Belot, United States District Judge for the District of Kansas, sitting by designation.

Precision Company (Precision) appeals the dismissal of its *qui tam* action for lack of subject matter jurisdiction. Fundamentally, this appeal involves the determination of circumstances under which a *qui tam* plaintiff must demonstrate itself to be an original source under the False Claims Act (FCA), 31 U.S.C. §3729 *et seq.* (1988). Applying the plain language of relevant statutory provisions to the circumstances of this action, we conclude Precision must qualify as an original source. We further conclude Precision has failed to so qualify, and therefore affirm the district court's dismissal.

Overview

Precision filed its complaint to recover, on behalf of the United States, civil penalties and damages from Defendant companies that allegedly filed false claims with the government. The complaint was grounded upon the factual premise that Defendants, by deliberate and systematic mismeasurement, had understated to the United States the quantity of crude oil and natural gas produced from Federal and Indian lands. The complaint was grounded upon the legal premise that Defendants, by the use of under-measurements, had presented false claims to the United States. The alleged false claims represent the difference between the mineral royalties actually reported and those which Defendants should have reported.

Precision commenced this action as a *qui tam* plaintiff pursuant to 31 U.S.C. § 3730(b). Section 3730(b) authorizes a person to bring a civil action in the name of and on behalf of the United States against a person who has submitted a false claim to the Government as defined by 31 U.S.C. §3729(a). However, the statute also provides that no court shall have jurisdiction over a *qui tam* action based upon the public disclosure of allegations or transactions unless the *qui tam* plaintiff is an original source of the publicly disclosed information. *See* 31 U.S.C. §3730(e)(4)(A).

Defendants challenged the trial court's subject matter jurisdiction by producing evidence establishing Precision's complaint was based, at least in part, upon publicly disclosed information. The trial court ruled a *qui tam* plaintiff whose complaint is based in any degree upon publicly disclosed information must demonstrate it was an original source as defined by statute. The trial court then dismissed the *qui tam* action for lack of subject matter jurisdiction, concluding Precision was not an original source.

Precision now appeals asserting: 1) the trial court erroneously construed the applicable statute; 2) the trial court erroneously concluded Precision was not an original source; and 3) the trial court erroneously disregarded affidavits that would have established Precision's status as an original source.

Analysis

The satisfaction of 31 U.S.C. §3730(e)(4) is, as the language indicates, an issue of subject matter jurisdiction. *See United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 18 (2nd Cir. 1990); *Houck ex rel. United States v. Folding Carton Admin. Comm.*, 881 F.2d 494, 503, 506 & n.9 (7th Cir. 1989), *cert. denied*, 494 U.S. 1026 (1990); *United States ex rel. LeBlanc v. Raytheon Co.*, 729 F. Supp. 170, 177 (D. Mass.), *aff'd* 913 F.2d 17 (1st Cir. 1990). We review issues of subject matter jurisdiction de novo.[1] *Thomas Brooks Chartered v. Burnett*, 920 F.2d 634, 641

[1]Because there is "no statutory direction for procedure upon an issue of jurisdiction, the mode of its determination is left to the trial court." *Sherman v. American Fed'n of Musicians*, 588 F.2d 1313, 1314 (10th Cir. 1978) (citing *Schramm v. Oakes*, 352 F.2d 143 (10th Cir. 1965)), cert. denied, 444 U.S. 825 (1979). "[T]he trial court may gather evidence on the question of jurisdiction by affidavits or otherwise in an effort to determine the facts as they exist." *Schramm*, 352 F.2d at 149. Factual findings made by the trial court on the question of jurisdiction will not be disturbed unless clearly erroneous. *Sherman*, 588 F.2d at 1314.

(10th Cir. 1990). Since federal courts are courts of limited jurisdiction, we presume no jurisdiction exists absent a showing of proof by the party asserting federal jurisdiction. *Penteco Corp. v. Union Gas System, Inc.*, 929 F.2d 1519, 1521 (10th Cir. 1991). Therefore, Precision, the party invoking federal jurisdiction in this case, must "allege in [its] pleading the facts essential to show jurisdiction," and "must support [those facts] by competent proof." *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *see also Penteco*, 929 F.2d at 1521.

I. FCA Jurisdictional Requirements

We begin our analysis with an examination of 31 U.S.C. §3730(e)(4), which provides:

> (e) Certain actions barred.--
>
> . . . .
>
> (4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

"[T]he starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *see also FDIC v. Canfield*, ___ F.2d ___, ___, 1992 WL 137888 *1, No. 91-4143 (10th Cir. June 23, 1992). In other words, "[u]nless the statutory language is ambiguous or would lead to absurd results, the plain meaning of the statute must control." *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1498 (11th Cir. 1991); *see also Glover Construction Co. v. Andrus*, 591 F.2d 554, 559 (10th Cir. 1979), *aff'd* 446 U.S. 608 (1980).

"Based Upon"

At the threshold, the plain, unambiguous language of §3730(e)(4)(A) states a *qui tam* action may be barred only if the action is "based upon" the public disclosure of "allegations or transactions." Precision would have us read this provision to apply only to actions based "solely" upon publicly disclosed information. We cannot countenance Precision's interpretation.

As a matter of common usage, the phrase "based upon" is properly understood to mean "supported by." In this context, an FCA *qui tam* action even partly based upon publicly disclosed allegations or transactions is nonetheless "based upon" such allegations or transactions. Congress chose not to insert the adverb "solely", and we cannot, because to do so would dramatically alter the statute's plain meaning.

Not only are we governed by the plain language of the statute, we must also be mindful that "statutes conferring jurisdiction on federal courts are to be strictly construed, and doubts resolved against federal jurisdiction." *F & S Construction Co. v. Jensen*, 337 F.2d 160, 161 (10th Cir. 1964). To insert the term "solely" into §3730(e)(4)(A) would impermissibly expand federal jurisdiction by allowing *qui*

tam plaintiffs to avoid the more exacting "original source" requirement simply by asserting an additional count. In other words, with a little artful pleading, all *qui tam* plaintiffs could pass the jurisdictional threshold by fashioning complaints only "partly based" upon publicly disclosed allegations or transactions.

A restrictive interpretation of the threshold "based upon" test is also consistent with the dual purpose of this statute. Section 3730--Civil actions for false claims, has two basic goals: 1) to encourage private citizens with first-hand knowledge to expose fraud; and 2) to avoid civil actions by opportunists attempting to capitalize on public information without seriously contributing to the disclosure of the fraud. *See United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1154 (3rd Cir. 1991). Consistent with these purposes, we believe the threshold "based upon" analysis is intended to be a quick trigger for the more exacting original source analysis. Two distinct inquiries are mandated by § 3730(e)(4)(A). Initially, the court must determine whether the action is "based upon the public disclosure of allegations or transactions." If the action is "based upon the public disclosure of allegations or transactions," then the court must determine whether the plaintiff qualifies as an "original source."[2] A fair reading of

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[2]These two inquiries should not be collapsed. The district court was absolutely correct in concluding the "unless" clause of this provision in not implicated until the "based upon" issue is resolved. Precision asserts United States ex rel. LaValley v. First Nat'l Bank of Boston, 707 F. Supp. 1351 (D. Mass. 1988), as authority for the proposition that an independent investigation which renders additional information is sufficient to satisfy the "based upon" test. However, we disagree with the Le Valley court's analysis insofar as it callapsed the two seperate inquiries of §3730(e)(4)(A) and (B). The threshold "based upon" test explicitly refers, in the disjunctive, to publicly disclosed "allegations or transactions." The scope of this threshold test cannot reasonably be interpreted to include "information" derived from subsequent investigation.

this statute in light of its dual purpose leads us to conclude Congress never intended a *qui tam* plaintiff to benefit in whole or in part upon publicly disclosed allegations or transactions *unless* that plaintiff can demonstrate he was an original source as defined by statute.

Finally, a more restrictive interpretation of "based upon" is consistent with practical considerations of judicial economy. It is one thing to expect the court to evaluate the quantity and quality of information in the public domain versus that possessed by the *qui tam* plaintiff after trial for purposes of fee determination;[3] it is quite another to expect a similar evaluation as part of a pre-trial jurisdictional inquiry. This type pretrial inquiry would be onerous, impractical and ultimately would serve neither the interests of the parties nor the court.

For all the foregoing reasons, we conclude that a plaintiff whose *qui tam* action is based in any part upon publicly disclosed allegations or transactions is subject to the "original source" jurisdictional requirement.

"Original Source"

Once it is determined a *qui tam* action is based upon publicly disclosed allegations or transactions, the district court maintains jurisdiction only if "the person bringing the action is an original source of the information." 31 U.S.C. §3730(e)(4)(A). "Original source" is expressly defined as

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[3]Precision asserts §3730(d)(1) supports its interpretation that only actions *solely* based on public disclosures are potentially barred. We disagree. Although §3730(d)(1) allows the court to determine fees in a *qui tam* action partly based on public information, §3730(d)(1) is not a jurisdictional provision. Moreover, its application is limited to those cases in which the government proceeds. The government has elected not to proceed in the present case; therefore §3730(d)(1) is not germane to this analysis.

> [A]n individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C. §3730(e)(4)(B).

Two jurisdictional requirements are evident from the plain language of this provision: 1) a *qui tam* plaintiff must have direct and independent knowledge of the information on which the allegations are based; and 2) a *qui tam* plaintiff must have voluntarily provided such information to the government prior to filing suit.[4] These requirements are plain, unambiguous and require no further scrutiny.

II. Precision's Showing

In light of our interpretation of §3730(e)(4), we now evaluate Precision's showing to determine whether the statutory jurisdictional requirements have been satisfied.

"Based Upon"

Allegations that Defendants, by deliberate and systematic mismeasurement, stole crude oil and natural gas from Federal and Indian lands were publicly disclosed on three occasions

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[4]Because we are able to decide this case on the basis of these two explicit requirements, we do not address Defendants' assertion that Precision cannot be an original source because it is not an individual. Nor do we address the merits of a third requirement imposed by the Second Circuit. *See Dick*, 912 F.2d at 16 (additional requirement that a *qui tam* plaintiff must have directly or indirectly been a source to the entity that publicly disclosed the allegations).

prior to Precision filing this *qui tam* action. First, William Koch, Precision's majority shareholder, raised allegations of crude oil theft in three previous lawsuits. These allegations were embodied as RICO counts in civil suits instituted by William Koch in 1981, 1982, and 1985. *See Oxbow Energy, Inc. v. Koch Indus., Inc.*, 686 F. Supp. 278 (D. Kan. 1988); *Koch v. Koch*, 1989 WL 87624, No. 88-1320-K (D. Kan. July 19, 1989), *aff'd* 903 F.2d 1333 (10th Cir. 1990); and *Koch v. Koch Indus., Inc.*, 127 F.R.D. 206 (D. Kan. 1989). Substantial identity exists between the RICO allegations and Precision's FCA allegations. Second, allegations of crude oil and natural gas theft were disclosed during a public hearing of the Senate Select Committee on Indian Affairs. Again, substantial identity exists between the allegations raised before the Senate Committee and Precision's *qui tam* allegations. Finally, the record reveals these same allegations were disclosed in numerous news releases.[5]

The record before us leaves no doubt Precision's complaint is "based upon" publicly disclosed allegations and Precision must therefore qualify as an original source in order to proceed with its claim.

"Original Source"

After carefully evaluating the record to determine whether Precision has shown by competent proof it qualifies as an original source, we conclude it has not. Precision has failed to meet the first jurisdictional requirement under the "original source" definition -- the record is devoid of proof Precision possesses sufficient direct and independent knowledge of information on which its allegations are based.

Precision rests its claim on three classes of information:

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[5]Allegations disclosed via civil litigation, congressional hearings and the news media fall within the scope of public disclosure as contemplated by §3730. 31 U.S.C. §3730(e)(4)(A).

1) information gathered by William Koch; 2) information gathered by William Presley from January 1988 to June 1988; and 3) information gathered by William Presley after becoming president of Precision in July 1988.

Notably, Precision is the *qui tam* plaintiff in the present action, not William Koch or William Presley. Precision did not come into existence as a corporate entity until June 1988. Precision has made no showing it has a legitimate claim to information gathered by Mr. Koch or Mr. Presley prior to its formation. Therefore, Precision cannot seriously argue it qualifies as an original source of the first two classes of information upon which its FCA allegations are based.

With regard to information gathered after Precision was formed -- one affidavit, nineteen unverified statements, four interview summaries, and various "reports" regarding backgauging, tank strapping and gas sales meter runs -- we conclude this information is best characterized as a continuation of, or derived from Mr. Presley's and Mr. Koch's individual investigations. Comparing this third class of information to the first two classes, the information procured by Precision is weak, informal and strikingly redundant. Precision's "independent" information does not convince us it possesses the requisite direct and independent knowledge of the information on which its FCA allegations are based.

Having concluded Precision's FCA complaint is "based upon" publicly disclosed allegations, and having concluded Precision failed to show it qualifies as an original source, we AFFIRM the district court's dismissal of Precision's complaint for lack of subject matter jurisdiction.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, ex rel. THE PRECISION COMPANY, Plaintiff - Appellant,	)
v.	) No. 91-5062
KOCH INDUSTRIES, INC.; KOCH EXPLORATION CO.; KOCH PIPELINE, INC.; KOCH SERVICES, INC.; KOCH GATHERING SYSTEMS, INC.; MINNESOTA PIPE LINE CO.; QUANAH PIPELINE CORP.; QUIVIRA GAS CO.; KOCH OIL CO. OF TEXAS, INC.; GULF CENTRAL STORAGE & TERMINAL CO. OF NEBRASKA; SOUTHWEST PIPELINE CO.; CHAPARRAL PIPELINE (NGL) CO.;GULF CENTRAL PIPELINE CO.; KOGAS, INC., Defendants - Appellees.	)

ORDER
Entered August 31, 1992

Before Baldock, Brorby, Circuit Judges, Belot*, District Judge.

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*The Honorable Monti L. Belot, United States District Judge for the District of Kansas, sitting by designation.

This matter comes on for consideration of appellant's petition for rehearing and motion to add parties filed in the

captioned cause.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision. The motion to add parties is also denied.

Entered for the Court
ROBERT L. HOECKER, Clerk

By: /s/
Patrick Fisher
Chief Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, ex rel. THE PRECISION COMPANY,	)	
Plaintiff,	)	
v.	)	89-C-437-C
KOCH INDUSTRIES, INC., et al.,	)	
Defendants.	)	

FINDINGS AND RECOMMENDATIONS

Now before the Court is Defendants' Motion to Dismiss for lack of subject matter jurisdiction. Plaintiff brings this suit on behalf of the United States under the qui tam provisions of the False Claims Act (31 U.S.C. §§3729-3733). Defendants assert the jurisdictional provisions found at §3730(e)(4)(A) and (B) have not been satisfied. Section 3730(e)(4) states:

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the

information.

> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

In moving for dismissal, Defendants set forth three principal arguments. First, Defendants assert that the action is based on facts publicly disclosed prior to the filing of Plaintiff's action, and that Plaintiff was not the "original source" of the publicly disclosed information. Second, Defendants assert that Plaintiff can never be an "original source". Third, Defendants contend the action is a subterfuge, brought for purposes of ill will, to harass and annoy them.

The Public Disclosure Element

For either argument to have merit the Court must first find that the Complaint is, in fact, based upon the publicly disclosed information.[1] Should the facts appear otherwise, the "original source" analysis becomes irrelevant. USA, ex rel. LaValley v. First National Bank or Boston, 707 F.Supp. 1351, 1367 (D. Mass. 1988) ("In light of the court's holding that the complaint in this case was not "based upon a public disclosure," this court need not determine whether the relator, LaValley, was an original source of information disclosed

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[1]The "public disclosure" stricture was a response to a Supreme Court decision interpreting the original Act as allowing a qui tam Plaintiff to simply copy his civil complaint from a prior criminal fraud indictment, thus, bringing nothing new to the suit. See, U.S. v. ex rel. Marcus v. Hess, 317 U.S. 537 (1943).

publicly. Section 3730(e)(4)(A) only requires that the relator be an original source of the information in a public disclosure if the court finds that the relator's action was based upon that public disclosure. This action is not, therefore, barred by the jurisdictional bar of the False Claims Act, 31 U.S.C. §3730(e)(4)(A)."

Senate Hearing Disclosures

To this end, Defendants assert that the Complaint is based upon information disclosed at hearings on May 9th and 10th, 1989 before the Special Committee on Investigations, Select Committee on Indian Affairs (U.S. Senate), or news articles reporting on the hearings. (See, *Affidavits of Clyde A. Muchmore*, dated May 30, 1990 and June 5, 1990.) Alternatively, Defendants claim the Complaint is based on information made public in other Koch litigation. (See *Affidavit of Clyde A. Muchmore*, dated May 30, 1990, ¶ 4.) As a result, Defendant asserts that Plaintiff is not the "original source" of the information and is not properly a party-Plaintiff to this action.

Because Defendants, in effect, challenge the jurisdiction of this Court to entertain Plaintiff's action, the United States Magistrate has reviewed each of the various affidavits, transcripts, and other exhibits submitted on this issue. *Western Transportation Company v. Couzans Warehouse & Distributors, Inc.*, 695 F.2d 1033, 1038 (7th 1982) ("We note that the district court may review any evidence submitted on the issue to determine if subject matter jurisdiction exists.")

Upon review of the foregoing materials, the United States Magistrate finds as follows. The "based upon" language of §3730(e)(4)(A) is not defined in the Act; hence, two interpretations of the language are possible in this case, each leading to a different result. One view holds that once a public allegation is made, i.e., that a defendant employed a particular methodology in submitting false claims, any qui tam suit thereafter filed, alleging the same defendant

employed the same methodology, subjects the qui tam plaintiff to "original source" analysis. In this case, applying this interpretation, because it was publicly disclosed that Koch allegedly submitted falsified oil records through a method of mismeasuring, prior to the filing of this suit, Precision would have to be an "original source" of the allegation, or its claims are barred.

The second interpretation requires the Court examine Plaintiff's collection of facts and witnesses at the time of filing the action, and compare them to the underlying facts and witnesses disclosed publicly. The second view requires the Court to look past the public disclosures and, instead, inspect the underlying factual predicates brought by the particular plaintiff. In this case, applying the second view, if Precision's action is based upon facts and witnesses different from the specific facts and witnesses publicly disclosed, Precision need not be an "original source"; i.e., it need not be the originator of the publicly disclosed allegations of wrong-doing. It is sufficient if the claim it now brings is based upon entirely different facts than those earlier made public.

Turning then to the May 9th, 1989 Senate Committee hearing, review of the transcript indicates that (6) individuals testified about Koch's alleged oil mismeasurements. They are Fred Merritt (investigator for a District Attorney's Office), Christopher Tucker (consulting firm), Richard Elroy (FBI), Grey Pyles (oil security specialist), Gene Poteet (contract pumper and former Koch gauger), James Spaulding (contractor and former Koch trucker/gauger), as well as two Indian royalty owners selling to Koch. The newspaper clippings submitted to the Court do not substantially add to the information disclosed in the Senate hearing. If Plaintiff's action is based on information disclosed at the hearing by the above witnesses, then Plaintiff must satisfy the "original source" requirement to vest this Court with jurisdiction.

Upon review of the facts, and in light of §3730(e)(4)(A), the Magistrate finds that Plaintiff's suit (filed May 25th, 1989) is based both upon facts and witnesses discovered

prior to, and following the Senate disclosures. The Magistrate also finds that the action incorporates, to a degree, some of the disclosures made public at the Senate hearings.

Plaintiff's President, William Presley, submits an affidavit which states that the suit is based upon facts obtained during the investigation and interviews of twenty-one (21) Koch employees during the first half of 1988. None of these witnesses testified before the Senate Subcommittee (Plaintiff's Supplemental Memorandum Re: Defendants' Motion to Dismiss, *Affidavit of William A. Presley*, referring to *Exhibit A*.) Presley further states that he interviewed an additional twenty-nine (29) witnesses while investigating this lawsuit. (Id. at *Exhibit B*.) Likewise, none of these witnesses testified before the Senate. After obtaining these witness statements and affidavits, but before filing the instant suit, Presley obtained additional evidence from several of these non-hearing witnesses. (Id. at *Exhibit E*.) The contents of these witness statements, summaries and affidavits are found in the Submission of the Precision Company Regarding Affidavits, Statements, Reports, and Notes of Interviews (2 vols.). The Senate hearings are not, however, the only prior "public disclosures" made of alleged Koch wrongdoing. Preceding both the filing of this action and the Senate hearings are several lawsuits filed by *William I. Koch*, a member of the Koch family and principal shareholder of Plaintiff, "The Precision Company".

Defendants note and argue that the case at bar is "based upon" information publicly disclosed in the case, *Wm. I. Koch v. Koch Industries*, No. 85-1636C (U.S.D.C. D. Kansas). In that Kansas-based action several affidavits were filed on February 23, 1989, some three months prior to the instant action. (See, *Exhibit H, Affidavit of Clyde Muchmore*, filed June 5, 1990; *Exhibit L, Affidavit of Clyde Muchmore*, filed May 31, 1990.) Of twenty (20) statements and affidavits, three are clearly among the statements relied upon by Presley in bringing the instant action: i.e., the *Affidavit of Steven Chin*, March 18, 1988; the *Affidavit of W. Leonard*

Clark, June 4, 1988; and the *Affidavit of W.J. Miller*, July 22, 1988. (See, Plaintiff's Supplemental Memorandum Re: Defendants' Motion to Dismiss, *Exhibit F.*)

Those affidavits set forth the alleged wrongdoings of Koch Industries and were plainly "made public" before the filing of this action.

When considering the effect of these prior public disclosures, the United States Magistrate is keenly aware of the fact that the False Claims Act does not define the term "based upon", as used in §3730(e)(4)(A) (i.e., "No court shall have jurisdiction over an action ... based upon the public disclosure of allegations or transactions ...") Defendants argue that if any part of the action alleges facts which were part of a public disclosure, then the action is "based upon" the public disclosure and the original source requirement must be satisfied. In contrast, Plaintiff's position is that the term "solely" should be read into the statute so that the original source provision is triggered only where the action is "based solely upon" public information. Review of the Act, and of Congress' intent in framing the current statute, reveals the following.

In *Marcus v. Hess*, 317 U.S. 537 (1943) the qui tam Plaintiff filed the suit based solely upon a prior criminal indictment. The *Marcus* decision triggered the first disclosure amendments to the False Claims Act, which have been described as a "jurisdictional bar designed to limit plagiarism on the part of qui tam realtors." *U.S. ex rel. Woodard v. Country View Care*, 797 F.2d 888, 891 (10th Cir. 1986).

Describing the later proposed 1986 amendments to the qui tam provisions, Senator Grassley remarked:

> This amendment seeks to ensure that a qui tam action based solely on public disclosures cannot be brought . . .

132 Cong. Rec. 11,244 (Aug. 11, 1977) (Emphasis added.) See also *U.S. ex rel. Dick v. Long Island Lighting*, 710 F.Supp. 1485 (E.D.N.Y. 1989) (Qui tam action dismissed where Plaintiffs "came into the case on a copied complaint").

The Act itself provides that where the Government takes over the case, qui tam Plaintiffs may share in the rewards, according to what they contributed before Government takeover. A qui tam Plaintiff who "substantially contributed" to the suit is entitled to receive 15 to 20% of the proceeds. Section 3730(d)(1). More importantly, and supportive of Plaintiff's position, is that Plaintiffs who bring suits "based primarily on" prior public disclosures are still entitled to up to 10% of the proceeds won. Id. The implication is that only suits based entirely, or solely, upon public disclosures are jurisdictionally barred. Senator Grassley further remarked,

> This [10%] limitation will affect those persons who have brought a qui tam action based almost entirely on information of which they ... had derived from a public source.

132 Cong. Rec. 11,244 (Aug. 11, 1986) (Emphasis added).

Consequently, it can be reasonably argued that Congress intended to reward Plaintiffs according to the amount of new evidence brought into the suit; greater awards to those bringing much, lesser awards to those bringing little. Only those Plaintiffs with nothing new to offer ("plagiarizers" in the vernacular of Woodard) are jurisdictionally barred. In this light, the Precision Company bears little resemblance to a *Long Island Lighting* or *Marcus v. Hess* type plaintiff, who brought their suits based upon copied complaints. On the contrary, Precision has shown that the instant action is not solely "based upon" public disclosures such that it must

satisfy the original source rule.[2] Much information was

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[2]Even if it did have to satisfy the rule, there exists little question that either Plaintiff's president (Pressley) or its majority owner (Wm. Koch) were the original sources of both the Senate hearing information (to a large degree) and the Kansas lawsuit information. E.g., U.S. ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Provident Life and Accident Ins. Co., 721 F.Supp. 1247 (S.D. Fla. 1989) ("Stinson I"); contra, U.S. ex rel. Stinson, Lyons, Gerlin & Bustamante v. Prudential Ins. Co. of America, slip op. No. 90-256 (D.N.J. May 4, 1990) ("Stinson II").

Defendants also argue that a corporation (the plaintiff) can never be an "original source" because an "original source" is defined by the Act to be a an "individual" rather than a "person". See, §3730(e)(4)(B). The Magistrate disagrees. Congress uses the word "person" several times throughout the Act to describe the would-be Plaintiff. See §3730(b)(1) ("A person may bring a civil action"); §3730(b)(5) ("when a person brings an action"); §3730(c)(1), (2), (3), (4), and (5); §3730(d)(1), (2), (3), and (4); §3730(e)(3) and (4)(A); §3730(f). A corporation is a "person". 1 U.S.C. § 1. See also, S. Rep. No. 99-345, 99th Cong. 2d Sess., reprinted in, 6 U.S. Code Cong. and Ad. News 5266, 5273 (1986) ("The term "person" is used in its broad sense to include partnerships, associations, and corporations.") It would make no sense if a corporation were allowed to bring a qui tam action in all cases except where the case is based upon a public disclosure (thus requiring an "individual" to bring suit, under Defendant's view of the original source requirement).

There is nothing in the legislative history of the 1986 amendments to suggest such an intentional dichotomy. The original source requirement springs from a distaste for copy-cat qui tam complaints. The original source concern is not predicated upon an inherent favoritism for breathing individuals as plaintiffs rather than corporate plaintiffs. Indeed, it would be a rare individual with the backbone and legal resources to take on a large government contractor, no matter how great the fraud, or the potential reward. And, the fact that the corporation was founded by Koch and Pressley after they had acquired some of their information is not a bar to Precision's action. While there is little doubt in the Magistrate's mind that Precision was formed for the sole purpose of bringing the instant action, the fact is the information it uses was gathered by its president and principal shareholder. To throw Precision out of court, applying the "original source rule", because its founders and not "it", were the original sources, is nothing less than placing form over substance.

Other courts have had no problem with allowing an artificial

garnered by Wm. Koch and Pressley prior to the February affidavits, and much, following the Senate hearings. Thus, the Magistrate finds, that while there has been prior public disclosure of the issues raised here, this action is not founded on facts set forth only in those disclosures. Other facts have clearly been gathered to substantiate and ground this action. In accord with the expressed purposes of a qui tam action, as reflected by legislative history, Plaintiff may rely in part on public disclosures and still supply facts from its own investigation to support its case; thus obviating the need to satisfy the "original source" requirement.

The Plaintiffs' Underlying Motivation

Finally, Defendants disparage Plaintiff's action, reserving their harshest obloquy for Wm. Koch's apparent motivation of revenge in filing the suit. Defendants describe the action as "one more in a long series of vexatious lawsuits by William I. Koch against Koch Industries and his family." Koch's Reply Brief, at 2. Defendants complain that Wm. Koch "can be characterized as a bounty hunter at best, and at worst, a cynical and vengeful opportunist, misusing the statutes of the United States." Defendants' Response to Precision's Motion to Lift Stay of Discovery, at 3. Defendants assert that Koch's motivation is relevant because they claim suits "motivated by other than the economic reward provided are not welcome under the Act." Koch's

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"person" to be a qui tam plaintiff. E.g., U.S. ex rel. Woodard, 797 F.2d 888 (Plaintiff was State of Colorado); Stinson I 721 F.Supp. 1247 (Plaintiff was professional association); U.S. ex rel. State of Wisconsin v. Dean, 729 F.2d 1100 (7th Cir. 1984 (Plaintiff was State of Wisconsin).

Reply Brief, at 2.[3]

Defendants' postulate is not supported by the history of the Act. To the contrary, it was recognized early on that the qui tam provisions might be used by Plaintiffs' with non-economic motivations. As early as 1885 it was understood that a qui tam plaintiff, acting upon less than honorable motives, would still protect the federal treasury from fraud. The Court in *U.S. v. Griswold*, 24 F. 361, 366 (D. Ore. 1885), observed,

> [The False Claims Act] was passed upon the theory based on experience as old as modern civilization, that one of the least expensive and most effective means of preventing frauds on the Treasury is to make the perpetrators of them liable to actions by private persons acting, if you please, under the strong stimulus of personal ill will or the hope of gain.

(Emphasis added) (quoted in *Marcus v. Hess*, 317 U.S. 537, n.5 (1943).) The *Griswold* passage is contained in the legislative history of the 1986 amendments as part of the Senate Report. S. Rep. No. 99-345, 99th Cong. 2nd Sess., reprinted in, 6 U.S. Code Cong. and Ad. News, 5266, 5276 (1986). The amendments do, however, provide for payment of a defendant's attorneys' fees if the suit is both unsuccessful and "clearly vexatious, or brought primarily for purposes of harassment." §3370(d)(4). However, if the suit is meritorious and the U.S. Treasury will benefit, there is no distinction made for suits motivated by pure patriotism and

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[3]In support, Koch highlights the 1989 amendment in §3730(e)(2) in response to "concerns" of increased suits filed to achieve political ends. The argument is specious. Congress' response was to bar suits against certain politically sensitive government employees: congressmen, judges, and senior executive branch officials. Congress does not provide a bar for suits motivated by avarice, animosity or ill will.

suits energized by personal revenge. Plaintiff's final argument, while troubling, i.e., to the extent that the courts become a forum for family feuds or tactical gain, has, in the long run, no merit in light of the ultimate purpose of the Act.

Conclusion

The United States Magistrate finds that the case at bar is not based upon prior public disclosures such that Plaintiff need be an original source in order for this Court to have jurisdiction under 31 U.S.C. §3730(e)(4). To the contrary, the undersigned finds that Plaintiff has brought a proper qui tam action over which this Court has jurisdiction. Therefore, it is the recommendation of the Magistrate that Defendants' Motion to Dismiss be denied.

Pursuant to Local Rule 32(D), parties are given ten (10) days from the above filing date to file any objections with supporting brief.

Dated this 14th day of September, 1990.

JEFFREY S. WOLFE
JEFFREY S. WOLFE
UNITED STATES MAGISTRATE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, ex rel. THE PRECISION COMPANY,	)	
Plaintiff,	)	
vs.	)	No. 89-C-437-C
KOCH INDUSTRIES, INC., et al.,	)	
Defendants.	)	

ORDER

Before the Court is defendants' objection to the Report and Recommendation of the United States Magistrate. The Magistrate recommended that the motion of the defendants to dismiss be denied. This is a qui tam action brought under the False Claims Act, 31 U.S.C. §3729, et seq. (the Act). By statute a qui tam action allows an informer to become a "private attorney general" with a portion of the recovery going to the informer and the remainder to the state. U.S. ex rel LeBlanc v. Raytheon Co., 913 F.2d 17, 19 n.2 (1st Cir. 1990).

The focus of the present motion is §3730(e)(4) of the Act, which provides as follows:

> (4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions

> in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office Report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

The Magistrate found, and the parties do not dispute, that the first count of the Complaint is (at least in part) based upon publicly disclosed allegations or transactions. In defendants' words: "Thus, the question is squarely presented -- may a plaintiff maintain a qui tam action without qualifying as the original source if its complaint is based only partly upon public disclosures?" (Defendants' objection at 21).

As the Magistrate noted (Report and Recommendation at 3-4), two interpretations of the "based upon" language are possible. One is to compare the public disclosure to the Complaint's allegations. If the threshold determination is made that the action is "based upon" public disclosures, then the suit is barred unless plaintiff qualifies as an original source. The second interpretation requires the Court to compare the public disclosure to plaintiff's own cache of information. If plaintiff's specific facts and witnesses are different from the specific facts and witnesses publicly disclosed, plaintiff need not be an original source. Defendants argue for the first view, while the plaintiff argues

for the second view.

The Magistrate likewise endorsed the second view, and undertook a detailed analysis of plaintiff's pre-Complaint investigation. His legal conclusion was that "only suits based entirely, or solely, upon public disclosures are jurisdictionally barred" (Report and Recommendation at 7), and that "Plaintiff may rely in part on public disclosures and still supply facts from its own investigation to support its case; thus obviating the need to satisfy the 'original source' requirement." (Id. at 8).

Authority exists which appears to favor the Magistrate's conclusion. In dicta, the Seventh Circuit has stated that "the Act in its present form does not allow a qui tam plaintiff to bring an action based solely on publicly disclosed transactions." Houck on Behalf of U.S. v. Folding Carton Admin., 881 F.2d 494, 504 (7th Cir. 1989). In U.S. ex rel. LaValley v. First Nat. Bank of Boston, 707 F.Supp. 1351 (D.Mass. 1988), the court employed the method of going behind the Complaint's allegations to examine plaintiff's underlying factual inquiry. Id. at 1366-67. Plaintiff herein has also cited passages from the legislative history of the Act, wherein a sponsor of the 1986 amendments stated that the amendments sought to assure that a qui tam action based solely on public disclosure could not be brought by an individual with no direct or independent knowledge of the information. (Plaintiff's Response at 11-12).

The Court must also keep in mind various principles of construction laid down by the Supreme Court. "[T]he starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." Consumer Product Safety Com'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980). Further, "[g]iven the plain words of the statute," Congress' intent is "best determined by the statutory language that it chooses." Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 495 n.13 (1985).

Engrafting the word "solely" onto the statute does not represent a minor judicial gloss. It dramatically expands federal jurisdiction in this area. Clearly, Congress knew how to draft such language if it wished to do so. See NLRB v. Bildisco & Bildisco, 465 U.S. 513, 522-23 (1984). Statutes conferring jurisdiction on federal courts are to be strictly construed, and doubts resolved against federal jurisdiction. F & S Construction Co. v. Jensen, 337 F.2d 160, 161 (10th Cir. 1964). This Court also takes note of the recent warnings regarding judicial reliance upon unenacted legislative history as opposed to statutory language. See e.g., U.S. v. Taylor, 487 U.S. 326, 344-46 (1988) (Scalia, J., concurring); I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 452-53 (1987) (Scalia, J., concurring); Wallace v. Christensen, 802 F.2d 1539, 1560 (9th Cir. 1986) (Kozinsky, J., dissenting). Finally, the Court disagrees with the Magistrate's reliance upon §3730(d)(1), which discusses an action "based primarily on" prior public disclosures. By its terms, that section is limited to actions in which the government elects to proceed. §3730(d)(2) addresses situations where the government chooses not to proceed. As a matter of textual interpretation, the Court concludes that a qui tam action based in any degree upon public disclosures requires a court to proceed to "original source" analysis. See U.S. ex rel Dick v. Long Island Lighting Co., 912 F.2d 13, 18 (2nd Cir. 1990) ("[W]e believe that if the information on which a qui tam suit is based is in the public domain, and the qui tam plaintiff was not a source of that information, then the suit is barred.")[1]

As noted, §3730(e)(4)(B) requires an original source to be (1) an individual, (2) with direct and personal knowledge of the information on which the allegations are based and

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[1]The method employed by the court in LeValley, supra, actually collapses the two seperate inquiries of §3730(e)(4)(A) and (B). This is evidenced by the courts's use of "independently," 707 F.Supp. at 1367, a term proper to "original source" analysis under (B). In this Court's view, the "unless" clause of (A) is not implicated until the issue of whether the action is "based upon" public disclosure is resolved.

(3) who has voluntarily provided the information to the government before filing the action. Initially, defendants assert that, as a corporation, plaintiff does not qualify as an "individual" under the statute. The Magistrate pointed to the numerous times that the statute uses the word "person" to describe a qui tam plaintiff, and rejected the conclusion that a corporation is allowed to bring a qui tam action except where the case is based upon a public disclosure. (Report and Recommendation at 8 n.2). The Court agrees. It is notable that Congress altered its terminology as it did. However, interpreting the statute as defendants argue violates the principle that a statute should be interpreted as a whole. See Philbrook v. Glodgett, 421 U.S. 707, 713 (1975); Kokoszka v. Belford, 417 U.S. 642, 650 (1974); Richards v. United States, 369 U.S. 1, 11 (1962).

Second, the plaintiff must have "direct and independent" knowledge of the information. Again, the Court believes this standard is met. The term "direct" does not mean, as defendants appear to argue, that the plaintiff must be able to provide "eyewitness" testimony supporting the allegations. Rather, the requirement is satisfied if the plaintiff gains the information directly through its own interest and efforts and not fortuitously. See U.S. ex rel Stinson, Lyons, Gerlin & Bustamante v. Prudential Ins. Co. of America, 736 F.Supp. 614, 622-23 (D.N.J. 1990). Likewise, the information gained by plaintiff herein through its own investigation was "independent" of the public disclosure. Id. at 623.

The final requirement to qualify as an "original source" is that the plaintiff must have voluntarily provided the information to the government before filing the action. In his May 17, 1990 deposition, plaintiff's president William Presley testified that the information gathered between October of 1988 and May of 1989 had not been provided to the government. In a subsequent affidavit dated June 6, 1990, Presley stated that in fact the information had been provided. Defendants urge the Court to reject the affidavit as "uncorroborated and conclusory." (Defendants' Objection at

40). In the summary judgment context, the Tenth Circuit has made clear that an affidavit conflicting with the affiant's prior sworn statements may be disregarded if it constitutes an attempt to create a sham fact issue. Franks v. Nimmo, 796 F.2d 1230, 1237 (10th Cir. 1986). The court noted that relevant factors included whether the affiant was cross-examined, whether he had access to the pertinent evidence at the time of his earlier testimony, or whether the affidavit was based on newly discovered evidence, and whether the earlier testimony reflects confusion which the affidavit attempts to explain. Id. This Court has found no case applying the Franks principle regarding a motion of this type. However, it is established that "[t]he court, not a jury, must weigh the merits of what is presented on a Rule 12(b)(1) motion. ..." 5A C.Wright & A.Miller, Federal Practice and Procedure, §1350 at 234-35 (1990) (footnotes omitted). Thus, a court may resolve disputed facts in determining the motion. See Williamson v. Tucker, 645 F.2d 404, 413 (5th Cir.), cert. denied, 454 U.S. 897 (1981). If Franks applies regarding a summary judgment motion, it necessarily can be applicable regarding a 12(b)(1) motion. The Court believes that the subsequent Presley affidavit should be disregarded, and the Court finds that all of the information upon which the lawsuit is based was not provided to the government as required by the statute.[2] The Magistrate made no finding on this point;

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[2]As defendants note, the affidavit does not indicate that it is based upon personal knowledge and does not state that the information was given to the government before suit was filed. These constitute additional reasons to accord it less weight than an affidavit meeting these standards.

therefore, there is no question that the "clearly erroneous" standard is not implicated. cf. Case v. Mondragon, 887 F.2d 1388, 1392 n.2 (10th Cir. 1989), cert. denied, 110 S.Ct. 1490 (1990).

A party invoking the jurisdiction of the federal courts has the burden of proving that federal jurisdiction does exist. Wegerer v. First Commodity Corp. of Boston, 744 F.2d 719, 727 (10th Cir. 1984). The Court is not persuaded that plaintiff has met its burden.

It is the Order of the Court that the motion of the defendants to dismiss is hereby GRANTED.

IT IS SO ORDERED this 26th day of November, 1990.

H. DALE COOK
H. DALE COOK
Chief Judge, U. S. District Court